89-310

No. _____

In The

Supreme Court of the United States

October Term, 1989

Jay Manifold, Judy Roberts, Tom Hanna, Michael D. Lewis, Roy G. Lieberman, Marshall E. Cobb, James Carter, John Gieringer, Theresa Worley, Greta S. Buzzard, Peter M. Kerr, Carol Jean Tucker, Thomas Martin Edelman, Franklin M. Nugent, Mike Hurley, Gerald Geier, Michael J. D'Hooge, Mike Roberts, a/k/a Warren A. Roberts, III, and The Libertarian Party of Missouri,

Petitioners,

vs.

Roy D. Blunt, Secretary of State of the State of Missouri,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SCHWARTZ, HERMAN & DAVIDSON

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QUESTION PRESENTED

May the State of Missouri, consistent with the First and Fourteenth Amendments to the United States Constitution, deny a place on the general election ballot to the presidential and vice-presidential candidates of a "new" party under Missouri Law, based upon a requirement that such "new" parties file statutory declarations of candidacy for presidential electors three months prior to the election when, by contrast, established parties (Republicans and Democrats) are not required to file such declarations for electors until three weeks prior to the election, and when such disparate treatment of new and established parties, burdening fundamental rights, is neither necessary nor the least restrictive means available to satisfy asserted State interests.

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Petitioners,

vs.

Roy D. Blunt, Secretary of State of the State of Missouri

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The initial order and judgment of the Court of Appeals, which was entered on September 22, 1988 without opinion with provision for opinion and dissent to follow, appears herein as Appendix A. The panel decision rendered on December 14, 1988, with full opinion and dissent, reaffirming the September 22, 1988 order, appears herein as Appendix B, and is reported at 863 F.2d

1368 (8th Cir. 1988). The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on March 13, 1989, appears herein as Appendix C, and is reported at 873 F.2d 178 (8th Cir. 1989).

JURISDICTION

The final order of the panel hearing this appeal affirming the order of the District Court denying relief to Petitioners was issued on September 22, 1988, Judge Heaney dissenting, without opinion and with provision for opinion and dissent to follow. On October 5, 1988, Petitioners filed a timely petition for rehearing with suggestion for rehearing en banc with the United States Court of Appeals for the Eighth Circuit. On December 14, 1988, the panel issued a written opinion reaffirming its earlier order affirming the district court, with Judge Heaney again dissenting, with opinion. Petitioners immediately thereafter filed a second timely petition for rehearing, with suggestion for rehearing en banc, on December 27, 1988. On March 13, 1989, the United States Court of Appeals entered its order denying the petition for rehearing and the request for rehearing en banc. On May 26, 1989, Justice Blackmun, sitting as Circuit Justice, entered an order extending the time for the filing of the petition for writ of certiorari in this case to and including August 10, 1989. This petition is filed within that time as extended. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1254(1). A live Article III controversy is presented. *Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 1282 n. 8 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MISSOURI REVISED STATUTES

115.315 New political party, how formed. – 1. Any group of persons desiring to form a new political party throughout the state, or for any congressional district, state senate district, state representative district or circuit judge district, shall file a petition with the secretary of state. Any group of persons desiring to form a new party for any county shall file a petition with the election authority of the county.

2. Each page or a sheet attached to each page of each petition for the formation of a new political party shall:

(i) Declare concisely the intention to form a new political party in the state, district or county;

(ii) State in not more than five words the name of the proposed party. If presidential electors are to be nominated by petition, at least one qualified resident of each congressional district shall be named as a nominee for presidential elector. The number of candidates to be nominated shall equal the number of electors to which the state is entitled, and the name of their candidate for president and the name of their candidate for vice president shall be printed on each page or a sheet attached to each page of the petition. The names of the candidates for president and vice president may be added to the party name, but the names of the candidates for president and vice president shall not be printed on the official ballot without the written consent of such persons. Their written consent shall accompany and be deemed part of the petition;

(iii) Give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office;

(iv) State the office for which each candidate is to be nominated.

3. When submitting for filing, each petition shall contain the names and addresses of two people, not candidates, to serve as provisional chairman and treasurer

for the party in the event the party becomes a new political party.

4. If the new party is to be formed for the entire state, the petition shall be signed by the number of registered voters in each of the several congressional districts which is equal to at least one percent of the total number of votes cast in the district for governor in the 1st gubernatorial election, or by the number of registered voters in each of one-half of the several congressional districts which is equal to at least two percent of the total number of votes cast in the district for governor at the last gubernatorial election.

5. If the new party is to be formed for any district or county, the petition shall be signed by the number of registered voters in the district or county which is equal to at least two percent of the total number of voters who voted at the last election for candidates for the office being sought.

115.317. Filing of valid petition, effect of. – The filing of a valid petition shall constitute the political group a new party for the purpose of placing its name and the names of the candidates which appeared on the petition on the ballot at the next general election or the special election if the petition nominates a candidate to fill a vacancy which is to be filled at a special election. If presidential electors are nominated by the petition, the names of the candidates for elector shall not be placed on the official ballot, but the name of their candidate for president and the name of their candidate for vice president shall be placed on the official ballot at the next presidential election. If, at an election in which the new

party's candidates first appear, any of its candidates for a statewide office receives more than two percent of all votes cast for the office, the new party shall become an established political party for the state. If, at the election in which the new party's candidates first appear, any of its candidates for an office receives more than two percent of the votes cast for the office in any district or county, the new party shall become an established political party only for the district or county.

115.327. Declaration of candidacy, when required, form of. – When submitted for filing, each petition for the nomination of an independent candidate or for the formation of a new political party shall include a declaration of candidacy for each candidate to be nominated by the petition. Each declaration of candidacy for the office of presidential elector shall be in the form provided in Section 115.399. Each declaration of candidacy for an office other than presidential elector shall state the candidate's full name, residence address, office for which he proposes to be a candidate, the party, if any, upon whose ticket he is to be a candidate and that if nominated and elected he will qualify. Each such declaration shall be in substantially the following form:

I, _____, a resident and registered voter of the _____ precinct of the town of _____ or the _____ precinct of the _____ ward of the city of _____, or the _____ precinct of _____ township of the county of _____ and the State of Missouri, do announce myself a candidate for the office of _____ on the ticket, to be voted for at the general (special) election to be held on the ____ day of _____, 19____, and I further declare that if nominated and elected I will qualify.

_____	Subscribed and sworn to before
Signature of candidate	me this ____ day of _____, 19____.
_____	_____
Residence address	Signature of election official or officer authorized to administer oaths.

Each such declaration shall be subscribed and sworn to by the candidate before the election official accepting the candidate's petition, a notary public or other officer authorized by law to administer oaths.

115.329. Time for filing of petitions. – 1. The secretary of state or any election authority shall not accept for filing any petition for the formation of a new party or for the nomination of an independent candidate which is submitted prior to 8:00 a.m. on the day immediately following the general election next preceding the general election for which the petition is submitted or which is submitted after 5:00 p.m. on the first Monday in August immediately preceding the general election for which the petition is submitted.

2. When a special election to fill a vacancy is called, neither the secretary of state nor any election authority shall accept for filing any petition for the formation of a new party or for the nomination of an independent candidate which is submitted after 5:00 p.m. on the day which is midway between the day the election is called and the election day.

115.382. Name changes on ballot, how made. – Any election authority duly notified that a name is to be removed from the ballot or that a new candidate has been selected shall have the proper corrections made on the

ballot before the ballot is delivered to or while it is in the hands of the printer. If time does not permit correction of the printed ballot, the election authority shall have prepared small pasters, suitable for covering the name to be removed on the ballots, ballot labels or on the protective covering of each voting machine. If a candidate is replaced by a candidate pursuant to the provisions of Sections 115.361 to 115.377, the paster shall contain the name to be substituted in letters of the same size and type as all other names on the ballot. The appropriate election authorities shall see that such pasters are properly applied to the ballots, ballot labels or voting machines before they are used for voting.

115.399. Presidential and vice-presidential candidates, when certified to secretary of state – declaration of candidacy of presidential electors, from of. – 1. Not later than the tenth Tuesday prior to each presidential election, the state committee of each established political party shall certify in writing to the secretary of state the names of its nominees for president and vice president of the United States.

2. Not later than the third Tuesday prior to each presidential election, the state committee of each established political party shall certify in writing to the secretary of state the names of its nominees for presidential elector. At least one qualified resident of each congressional district shall be named as a nominee for presidential elector by each state committee, and the number of nominees for presidential elector named by each state committee shall equal the number to which the state is entitled.

3. When submitted for filing, each certification made by a state committee pursuant to the provisions of subsection 2 of this section shall be accompanied by a declaration of candidacy for each candidate for presidential elector. Each declaration of candidacy shall state the candidate's full name, resident address, office for which he proposes to be a candidate and that if elected he will qualify. Each such declaration shall be in substantially the following form:

I, _____, a resident of the _____ congressional district and the state of Missouri do announce myself a candidate for the office of presidential elector from the _____ congressional district (state at large) on the _____ ticket, to be voted for at the presidential election to be held on the ____ day of _____, 19____, and I further declare that if nominated and elected to such office I will qualify.

_____	Subscribed and sworn to before
Signature of candidate	me this ____ day of _____, 19____.
_____	_____
Residence address	Signature of election official or officer authorized to administer oaths.

Each such declaration shall be subscribed and sworn to by the candidate before the election official receiving the certification, a notary public or other officer authorized by law to administer oaths.

STATEMENT OF THE CASE

Petitioners in this cause are the Libertarian Party of Missouri (hereinafter Libertarians), the designated Libertarian presidential electors for the 1988 general election,

Libertarian candidates for various other federal and state elective posts for Missouri and other Libertarian officials. All of the individual petitioners are registered voters of the State of Missouri and citizens of Missouri and the United States (Complaint, Paragraph I, pages 1-4).

Respondent herein is the Missouri Secretary of State, Roy D. Blunt, who is charged with responsibility for administering the election laws of Missouri, including those governing new parties (Complaint, Paragraph II, p. 4).

This petition challenges the constitutional validity, under the First and Fourteenth Amendments, of the Missouri statutory scheme which, as interpreted by the courts below, requires "new" parties to file statutory declaration of candidacy for presidential electors some *three months* prior to the presidential election whereas "established" parties need to do so only *three weeks* before the election. In this case, in which petitioners furnished a list of electors but not declarations in the statutory form by the purported deadline, the penalty imposed by respondent under this statutory scheme was to refuse a place on the ballot to the presidential and vice-presidential candidates of the Libertarian Party.

On August 1, 1988, the first Monday in August, 1988, petitioner Gerald Geier, the Libertarian ballot access coordinator for Missouri filed a new party petition on behalf of the Libertarians in the office of respondent Secretary of State, in accordance with Section 115.315 of the Missouri Revised Statutes (R.S.Mo.). The petition was supported by approximately 41,000 signatures (T. 2-3, 4). The petition was filed by 5:00 p.m. on August 1 (T. 5, 15-16). The

new party petition was accompanied by declarations for the Libertarian candidates who were to appear on the ballot and a list of those persons who were to be Libertarian presidential electors (T. 5, Joint Stipulation Paragraph 6). The names of presidential electors do not appear on the ballot (T. 21). A declaration of candidacy differs from a list of candidacy in that a declaration is a sworn statement by the individual in a form prescribed by statute.

The employees of respondent Secretary of State receiving the new party petition asked for declarations for electors when the petition was filed and Mr. Geier expressed his belief that he did not understand that to be required by law at that time (T. 5, 7). "Established" political parties in Missouri are not required to name their electors until the third Tuesday prior to the presidential election." Section 115.399.2 R.S.Mo. In 1988, that was October 18. Geier believed that the Libertarians were not required to file their elector declarations prior to that time. Geier then discussed the situation with Paul Bloch, Deputy Secretary of State for Election Services. Bloch said he thought, and it was the interpretation of his office, that the declarations of candidacy were required at that time but further stated that he would have to check into it and that a determination would be made, in Bloch's words "in the near future." (T. 8, 24). At no time on August 1, 1988 did Bloch or any other employee of respondent inform Geier that the Libertarian candidates for president and vice-president of the United States would not appear on the ballot due to the filing of a list of electors with the petition rather than declarations of candidacy for electors (T. 5, 22, 24). Deputy Secretary of State Bloch testified that

he did not so inform Geier because he had not yet verified the signatures on the petition or determined whether the required number from each of the necessary congressional districts were presented. If the petition failed for one of those reasons, in Bloch's opinion, a discussion of whether the declaration issue would prevent the Libertarian presidential and vice-presidential candidates from appearing on the ballot "would have been pointless." (T. 22). The respondent Secretary of State's office does not publish any instructions for the guidance of new parties or independent candidates.

Following this August 1 discussion, Geier proceeded to obtain the declarations and received no further word from the Secretary of State. On September 6, 1988 the respondent's office made a public announcement that the Libertarian candidates for president and vice-president would not appear on the ballot. On September 7, the Libertarians filed the required declarations for electors with respondent's office. On September 8, respondent's office notified the Libertarians that their presidential and vice-presidential candidates would not appear on the general election ballot due to declarations for presidential electors not having been filed along with the new party petition on August 1, 1988.

The Complaint was filed on September 12, 1988 in the United States District Court for the Western District of Missouri seeking a declaration that the requirement of filing elector declarations with the new party petition was unconstitutional and an order requiring that the Libertarian presidential and vice-presidential candidates be included on the general election ballot. The jurisdiction of the District Court was invoked pursuant to 28

U.S.C. Sections 1343(3), 1343(4), 2201 and 2202 and 42 U.S.C. Section 1983. The cause came on for hearing on September 16, 1988. After hearing evidence, the District Court ruled from the bench, denying petitioners relief. Notice of appeal was promptly filed and the appeal was expedited. The final order of the Eighth Circuit panel hearing this appeal affirming the order of the District Court denying relief to Petitioners was issued on September 22, 1988, Judge Heaney dissenting, without opinion and with provision for opinion and dissent to follow. On October 5, 1988, Petitioners filed a timely petition for rehearing with suggestion for rehearing en banc with the United States Court of Appeals for the Eighth Circuit. On December 14, 1988, the panel issued a written opinion reaffirming its earlier order reaffirming the District Court, with Judge Heaney again dissenting, with opinion. The December 14, 1988 opinion is reported at 863 F.2d 1368 (Appendix B). Petitioners immediately thereafter filed a second timely petition for rehearing, with suggestion for rehearing en banc, on December 27, 1988. On March 13, 1989, the United States Court of Appeals entered its order denying the petition for rehearing and the request for rehearing en banc. Senior Circuit Judge Heaney dissented from the court's decision not to grant appellant's motion to rehear the appeal en banc and his dissent was joined by Chief Judge Lay and Circuit Judges McMillian and Arnold. Judge Fagg also indicated that he voted to grant the petition for rehearing en banc. Circuit Judges John R. Gibson, Bowman, Wollman, Magill and Beam apparently did not vote for rehearing en banc. Thus, the request for rehearing en banc was denied by an

equally divided court. The order denying rehearing is reported at 873 F.2d 178 (8th Cir. 1989) (Appendix C).

REASONS FOR GRANTING THE WRIT

"A [ballot access] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 793-794, 103 S.Ct. 1564, 1572 (1983). In the instant case, the Missouri legislature has established an increased obstacle to ballot access, which applies only to "new political parties" and not to "established political parties." By requiring that new political parties certify their electors more than two months earlier than established political parties, the Missouri legislature unfairly and unnecessarily burdens the availability of political opportunity both for the new political parties' attempt to attract qualified electors and foreclosure of electoral candidates choice of a party to become associated with. See similar analysis in *Anderson v. Celebrezze*: "The inquiry is whether the challenged restriction unfairly burdens the availability of political opportunity." *Celebrezze*, 460 U.S. at 793, 103 S.Ct. at 1572, citing *Clements v. Fashing*, 457 U.S. 957, 964, 102 S.Ct. 2836, 2844 (1982).

This Court recognized that access to the ballot is a "fundamental right" in *Celebrezze*, 460 U.S. at 788, 103 S.Ct. at 1569, a case which also involved in part disparate treatment of new and established parties. In *Celebrezze*,

this Court announced the following test, 460 U.S. at 789, 103 S.Ct. at 1570:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. *Storer*, supra, 415 U.S., at 730, 94 S.Ct., at 1279. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. *In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.* Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes*, supra, 393 U.S., at 30-31, 89 S.Ct. at 10; *Bullock v. Carter*, supra, 405 U.S. at 142-143, 92 S.Ct. at 855; *American Party of Texas v. White*, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979). (emphasis added).

See also Meyer v. Grant, ___ U.S. ___, 108 S.Ct. 1886, 1894 (1988) (prohibition against paying circulators of initiative petitions to place state constitutional amendment on general election ballot struck down as unnecessary to serve state's asserted interest).

The District Court and the Eighth Circuit panel departed from this standard when they upheld this disparate treatment of new and established political parties on the grounds that the early filing date for electors did not impose an "insurmountable burden" upon a new political party. The Eighth Circuit apparently reasoned that it was acceptable to impose additional burdens on new political parties so long as the burden was not an unreasonable one, citing *Unity Party v. Wallace*, 707 F.2d 59 (2nd Cir. 1983).

However, the Eighth Circuit confuses cases which discuss ballot access restrictions equally applicable to all parties with cases that impose disparate burdens on new parties or independent candidates versus established parties. In the former case, this Court and others have upheld ballot access restrictions which apply uniformly to all parties, both established, new and independent candidates, regardless of the complexity of such procedural restrictions, so long as the restrictions do not pose an insurmountable burden and such restrictions serve the state's interest in preventing fraud, confusion and chaos in the ballot process. Such restrictions were analyzed utilizing a balancing approach; balancing the need for the restrictions versus the burden of complying with the restrictions.

The Eighth Circuit mistakenly applied this balancing approach to the instant case in which the Missouri legislature has created additional procedural burdens for new political parties which are not applicable to "established parties", holding that it was permissible to place additional burdens on a newly established party so long as the additional burden did not create an "insurmountable

obstacle." The Eighth Circuit, while giving lip service to strict scrutiny analysis of such impingement upon the fundamental right of ballot access protected by the First Amendment, actually applied a minimal scrutiny rational basis test, expressly rejecting the least restrictive means that applied by this Court in all previous Fundamental Rights/Strict Scrutiny cases. Those judges of the Eighth Circuit, who dissented from the denial of rehearing en banc by an equally divided court, vociferously disagree, properly contending that the appropriate test would require application of the least restrictive means test, which would have invalidated the requirement for early filing of declarations for elector candidates.

The State's asserted justification for requiring new parties to file declarations for electors 3 *months* prior to the election while requiring established parties to do so only 3 *weeks* prior to the election is that the State does not wish to place the names of presidential and vice-presidential candidates on the ballot unless it has assurance that there will be electors for those candidates. The State argues that new parties must file declarations for electors at such an early date so that they may somehow be verified by the State prior to the printing of ballots, which occurred in this case in late September, 1988. The State argues explicitly that "established parties" may be relied upon to furnish electors and thus it has no concern about printing the names of their candidates on the ballot prior to their electors being named. By contrast, the State implicitly argues that a new party which presents sufficient signatures to qualify as a new party cannot somehow be similarly relied upon to furnish 11 electors, the number required in Missouri in 1988.

Judge Heaney, dissenting below, gave the short answer to these arguments:

> On August 1, 1988, the Libertarian Party filed 41,499 petition signatures, more than two times the showing of support required by statute. In view of the substantial showing of support required by the state and the actual support demonstrated by appellants, it is difficult to credit the concern that this "new" political party would not have been able to find a sufficient number of qualified presidential electors.
>
> In addition, even if one were to credit the state's concerns, it did not show that those concerns could have been met by a deadline later than August 1. The state represented that it did not need to begin distribution of absentee ballots until September 27, 1988. Even allowing the state a reasonable time to verify the qualifications of proposed electors for new parties prior to distribution of absentee ballots, it appears that the September 7, 1988, filing of the appellant would have afforded the state sufficient time to protect its interest.
>
> It is undeniable that the earlier filing deadline placed an obstacle in the path of the Libertarian Party which did not exist for either the Republican or Democratic Party. In light of the minimal interests served by this obstacle, the provision should have been found unconstitutional.

873 F.2d at 179 (Heaney, J., dissenting from denial of rehearing en banc).

Further, Missouri already has appropriate and less restrictive means other than disparate treatment of new and established parties to deal with the removal of a candidate name from the ballot in the most unlikely event

that necessary electors are not furnished. Section 115.383 provides that if a name must be removed from the ballot after printing, small pasters are to be applied simply covering the name.

Similarly, the State's argument that administrative convenience is served by allowing it to check electors before verifying petition signatures so that it could decline ballot access if electors could not be verified without the burden of verifying thousands of signatures is without substance and is belied by the record in this case and past practice of the respondent's office. First, in this case signatures had to be verified in any event because candidates for state offices such as governor were also involved, not just President of the United States and Vice-President. Second, Bloch's testimony makes it clear that his office as a matter of procedure verifies petition signatures before moving to candidate declarations. As he noted, if there were not sufficient signatures there would be no point in discussing elector issues. This was also the procedure followed in 1984 when the Libertarians failed to garner sufficient signatures to appear on the ballot. See *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985), in which the sole basis offered by the State for denying ballot access was a lack of sufficient signatures. Yet, Geier testified that Libertarian elector declarations in 1984 were not filed until October and that no one from the Secretary of State's office informed him that they should have been filed earlier or that such was in part the basis for denying access. That point was not raised by the State in *Bond*. In fact, the Eighth Circuit stated flatly that:

> Once a new party meets the Missouri signature requirement, it need do nothing more to get its

candidates on the ballot. Mo. Rev. Stat. Section 115.317 (1978).

764 F.2d at 542 (1985).

Thus, the administrative convenience argument is wholly without substance.

In short, the Eighth Circuit in this case took an approach which is not faithful to and is in conflict with holding of this Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983). Unless this Court issues its writ in this case, any political party in the Eighth Circuit that does not bear the label Democrat or Republican will be subject to discriminatory statutory regulation which will be sustained by the court below unless it presents an "insurmountable obstacle" to ballot access. See panel opinion below 863 F.2d at 1375. That is surely not the teaching of this Court. The writ should issue.

CONCLUSION

For all the foregoing reasons, petitioners respectfully pray this Honorable court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this action.

SCHWARTZ, HERMAN & DAVIDSON

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2394

Jay Manifold, Judy Roberts, Tom Hanna, Michael D. Lewis, Roy G. Lieberman, Marshall E. Cobb, James Carter, John Gieringer, Theresa Worley, Greta S. Buzzard, Peter M. Kerr, Carol Jean Tucker, Thomas Martin Edelman, Franklin M. Nugent, Mike Hurley, Gerald Geier, Michael J. D'Hooge, Mike Roberts a/k/a Warren A. Roberts, III, and The Libertarian Party of Missouri,	*	Appeal from the United States District Court for the Western District of Missouri.
Appellants,	*	
v.	*	
Roy D. Blunt, Secretary of State for the State of Missouri,	*	
Appellees.	*	

Filed: September 22, 1988

Before HEANEY, BOWMAN, and MAGILL, Circuit Judges.

ORDER

The order expediting the appeal is granted. The motion for an injunction and an order placing The Libertarian Party candidates for President and Vice-President on the ballot is denied and the decision of the District Court is affirmed, with Judge Heaney dissenting. Opinions will be filed later.

Mandate shall issue forthwith.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2394

Jay Manifold, Judy Roberts, Tom Hanna, Michael D. Lewis, Roy G. Lieberman, Marshall E. Cobb, James Carter, John Gieringer, Theresa Worley, Greta S. Buzzard, Peter M. Kerr, Carol Jean Tucker, Thomas Martin Edelman, Franklin M. Nugent, Mike Hurley, Gerald Geier, Michael J. D'Hooge, Mike Roberts a/k/a Warren A. Roberts, III, and The Libertarian Party of Missouri,	*	Appeal from the United States District Court for the Western District of Missouri.
Appellants,	*	
v.	*	
Roy D. Blunt, Secretary of State for the State of Missouri,	*	
Appellees.	*	

Submitted: September 19, 1988
Filed: December 14, 1988

Before HEANEY, BOWMAN, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

I. INTRODUCTION

This case involves an equal protection challenge to Missouri's "new party" ballot access statute. The Libertarian Party of Missouri and several of its members (Libertarians) challenged the constitutionality of Missouri's statutory requirement that new political parties certify their presidential electors earlier than established parties. The district court[1] denied the Libertarians' motion for an injunction requiring the Secretary of the State of Missouri to place the Libertarian Party candidates for President and Vice-President of the United States of Missouri's 1988 general election ballot. This expedited appeal followed. On September 22, 1988, this panel issued a final order affirming the order of the district court, Judge Heaney dissenting, with opinion and dissent to follow. We issued mandate at that time. We now reaffirm the order of the district court.

II. BACKGROUND

The Libertarian Party initiated this action after the Libertarians' candidates for President and Vice-President were declared ineligible to appear on Missouri's general election ballot. On August 1, 1988, the Libertarian Party

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[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

of Missouri presented Missouri's Secretary of State with a recognition petition containing sufficient signatures to qualify the Libertarians as a new political party under Missouri law.[2] The Libertarians did not present their final

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[2] Missouri law provides that a group seeking recognition as a new political party must prove its support by filing a recognition petition with the Secretary of State. Mo. Rev. Stat. §§ 115.315, .317 states:

> 115.315. New political party, how formed.–
>
> 1. Any group of persons desiring to form a new political party throughout the state, or for any congressional district, state senate district, state representative district or circuit judge district, shall file a petition with the secretary of state. Any group of persons desiring to form a new party for any county shall file a petition with the election authority of the county.
>
> 2. Each page or a sheet attached to each page of each petition for the formation of a new political party shall:
>
> (1) Declare concisely the intention to form a new political party in the state, district or county;
>
> (2) State in not more than five words the name of the proposed party.
>
> If presidential electors are to be nominated by petition, at least one qualified resident of each congressional district shall be named as a nominee for presidential elector. The number of candidates to be nominated shall equal the number of electors to which the state is entitled, and the name of their candidate for president and the name of their candidate for vice president shall be printed on each page or a sheet attached to each page of the petition. The names of the candidates for president and vice presi-

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dent may be added to the party name, but the names of the candidates for president and vice president shall not be printed on the official ballot without the written consent of such persons. Their written consent shall accompany and be deemed part of the petition;

(3) Give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office;

(4) State the office for which each candidate is to be nominated.

3. When submitted for filing, each petition shall contain the names and addresses of two people, not candidates, to serve as provisional chairman and treasurer for the party in the event the party becomes a new political party.

4. If the new party is to be formed for the entire state, the petition shall be signed by the number of registered voters in each of the several congressional districts which is equal to at least one percent of the total number of votes cast in the district for governor in the last gubernatorial elections, or by the number of registered voters in each of one-half of the several congressional districts which is equal to at least two percent of the total number of votes cast in the district for governor at the last gubernatorial election.

5. If the new party is to be formed for any district or county, the petition shall be signed by the number of registered voters in the district or county which is equal to at least two percent of the total number of voters who voted at the last election for candidates for the office being sought.

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> 115.317. Filing of valid petition, effect of. – The filing of a valid petition shall constitute the political group a new party for the purpose of placing its name and the names of the candidates which appeared on the petition on the ballot at the new general election or the special election if the petition nominates a candidate to fill a vacancy which is to be filled at a special election. If presidential electors are nominated by the petition, the names of the candidates for elector shall not be placed on the official ballot, but the name of their candidate for president and the name of their candidate for vice president shall be placed on the official ballot at the next presidential election. If, at an election in which the new party's candidates first appear, any of its candidates for a statewide office receives more than two percent of all votes cast for the office, the new party shall become an established political party for the state. If, at the election in which the new party's candidates first appear, any of its candidates for any office receives more than two percent of the votes cast for the office in any district or county, the new party shall become an established political party only for the district or county.

New party petitions must be submitted before 5:00 p.m. on the first Monday in August, here August 1. Mo. Rev. Stat. § 115.329 provides, in pertinent part:

> 115.329. Time for filing of petitions.–1. The secretary of state shall not accept for filing any petition for the formation of a new party or for the nomination of an independent candidate which is submitted prior to 8:00 a.m. on the day immediately following the general election next preceding the general election for which the petition is submitted or which is submitted after 5:00 p.m. on the first

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list of presidential electors or declarations of their candidacy until September 7, 1988.[3] On September 8, 1988, the Secretary of State informed the Libertarian Party that its candidates for president and vice-president would not appear on the Missouri ballot for the November 1988 election because the party had failed to file the final list of electors, along with their candidacy statements, by August 1, 1988. The Secretary of State accepted the Libertarian Party as a newly recognized party for offices other than president and vice-president. According to this ruling, the Missouri ballot for the November 1988 election will include Libertarian candidates for governor, lieutenant governor, treasurer, secretary of state, United States senator and United States representative – but will not list Libertarian presidential and vice-presidential candidates.

After learning that the Secretary of State refused to include the Libertarian presidential and vice-presidential candidates on the November ballot, the Libertarians sought to have certain provisions of the Missouri election laws[4] declared unconstitutional on equal protection

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Monday in August immediately preceding the general election for which the petition is submitted.

[3] Approximately one week before August 1, 1988, a representative of the Libertarian Party called the Secretary of State's office to inquire about the filing requirements for presidential electors and their candidacy statements. The deputy secretary of state told the caller that presidential electors and their declarations of candidacy had to be filed by 5:00 p.m. on August 1, the same deadline that applied to filing petitions.

[4] Specifically, Mo. Rev. Stat. §§ 115.315, .317, .327, .329 and .399.

grounds[5] and to permanently enjoin the Secretary of State from printing the ballot without the names of the Libertarian presidential and vice-presidential candidates listed on it. On September 16, 1988, the district court denied the Libertarian Party's request for relief, refusing to enjoin the state from printing the 1988 general election ballot without the Libertarian presidential and vice-presidential candidates.

The district court applied the method of analysis set forth by the United States Supreme court in *Anderson v. Celebreeze*, 460 U.S. 780 (1983). In *Anderson*, the Court held that, when faced with a restriction on voters' rights to vote for candidates of their choice or candidates' right to run for office, a court must first consider the character and magnitude of the asserted injury, then identify and evaluate the state's interest asserted as justification for the burden imposed by the rule. *Anderson*, 460 U.S. at 489. The district court found that the Libertarians clearly established the character and magnitude of the rights they allege have been violated. The court determined that the state's interest in assuring the integrity of the election ballot justified the burden imposed on new parties. Finally, the court found that requiring new parties to file a final list of electors and their candidacy statements with the recognition petition is a reasonable means of advancing the state's interest.

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[5] Under Missouri law, established parties must submit a list of presidential electors and their candidacy statements by the third Tuesday before the General Election – by October 18, 1988, for the November election. Mo. Rev. Stat. § 115.399(2).

The Libertarian Party appealed to this court. We agreed to review the matter immediately in light of Missouri's requirement that absentee ballots be available by September 27, 1988.[6]

III. DISCUSSION

A. Statutory Construction

The Libertarian Party's argument on appeal focuses on the language of the Missouri statute that requires a new party to include the names of candidates for presidential electors with the party's recognition petition *"if presidential electors are to be nominated by petition."* Mo. Rev. Stat. § 115.315 (emphasis added). The Libertarians argue that the statute does not, on its face, require new parties to submit information about their presidential electors at the time they submit their recognition petition. Their argument implies that new parties, at their own option, may choose to nominate electors through the recognition petition, or may choose to nominate electors by some other method not subject to the recognition petition deadline.

We find that Missouri law clearly requires new parties to include a list of presidential electors and their candidacy statements at the time of filing a new party recognition petition.[7] Section 115.327, entitled *"Declaration of candidacy, when required, form of"* states:

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[6] *See* Mo. Rev. Stat. § 155.281.

[7] The Libertarians point to sixteen other states that require new parties to file presidential elector information at the time

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> When submitted for filing, each petition for the * * * formation of a new political party *shall include a declaration of candidacy for each candidate to be nominated by the petition. Each declaration of candidacy for the office of presidential elector shall be in the form provided in section 115.399.*

Mo. Rev. Stat. § 115.327. As the district court found, § 115.327 requires new parties to include presidential elector information as part of their recognition petition.

The Libertarians bolster their assertion that elector candidacy statements need not be submitted at the same

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of filing a recognition petition: Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia and West Virginia. *See* appellants' brief at 5; *Presidential Election Timing Chart, 1988* (submitted by appellants and attached to their brief). Our review of the election laws of these sixteen states reveals that at least seven states require new parties to submit petitions including information about presidential electors *before* established parties have to submit information about their presidential electors: Colorado, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and West Virginia. *See* Appendix.

Our research has revealed no cases challenging the presidential elector requirements of an election scheme like Missouri's. We have found no previous instance where a ballot access provision has been found invalid on the grounds that requiring new parties to submit presidential elector information earlier than established parties violated equal protection. The fact that at least seven states besides Missouri require new parties to submit presidential elector information before established parties simply underscores the legitimacy of the states' interest and the reasonableness of the burden this statute imposes on the Libertarians.

time as recognition petitions with language from our ruling in *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985). In *Libertarian Party v. Bond*, we stated, in reference to § 115.317, that "[o]nce a new party meets the signature requirement, it need do nothing more in order to get its candidates on the ballot." 764 F.2d at 542. Taken in proper context, however, this quotation was comparing the requirements of § 115.317 with the overly stringent recognition schemes found unconstitutional in other states. *See Williams v. Rhodes*, 293 U.S. 23 (1968) (ballot access scheme declared unconstitutional where, even after meeting the signature requirement, the new party was required to engage in elaborate primary election machinery to get its candidates on the ballot). Furthermore, in light of the statutory requirement that new parties include presidential elector information with their recognition petitions, a new party must include such information on the petition in order to meet the signature requirement of § 115.317.

B. Equal Protection

Having found that Missouri law required the Libertarian Party to attach the names and candidacy statements of presidential electors to its recognition petition, we now turn to a discussion of the requirement's constitutionality. The Libertarian Party bases its equal protection argument on the fact that Missouri law requires new parties to submit their presidential electors before established parties.[8] We agree with the district court that the

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[8] Mo. Rev. Stat. § 115.399.2 provides:

Not later than the third Tuesday prior to each Presidential election, the state committee of each established

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challenged provisions of Missouri's ballot access statute do not deny appellants' right to equal protection.

1. Standard of Review

In *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985), a panel of this court recognized that ballot access restrictions endanger vital individual rights, including "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Anderson v. Celebreeze*, 460 U.S. at 787 (quoted in *Libertarian Party v. Bond*, 764 F.2d 538, 540 (8th Cir. 1985)). Mindful of the danger posed to these rights by ballot access restrictions, the panel concluded that such provisions must be subjected to strict scrutiny. *Libertarian Party v. Bond*, 764 F.2d at 540. We agree, and shall therefore apply that standard of review in this case.[9]

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political party shall certify in writing to the Secretary of State the names of its nominees for presidential electors.

Missouri law does not require write-in candidates to submit presidential electors and declarations of their candidacy. *See* Mo. Rev. Stat. § 115.453(4).

[9] Over the past twenty years, the United States Supreme Court has decided several cases involving equal protection challenges to ballot access statutes. *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating Ohio's ballot access requirements); *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding Georgia's ballot access requirements); *Storer v. Brown*, 415 U.S. 724 (1974)

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(remanding case involving California ballot access scheme to determine whether reasonably diligent candidate could be expected to satisfy requirements); *American Party v. White*, 415 U.S. 767 (1974) (holding Texas access requirements); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (invalidating Illinois signature requirement); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating Ohio signature requirement); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding Washington ballot access requirement).

A close reading of these cases reveals that while the Supreme Court generally purports to subject ballot access requirements to strict scrutiny, the Court has not used that term consistently. *See National Prohibition Party v. Colorado*, 752 P.2d 80 (10th Cir. 1988) (discussing inconsistency in Supreme Court cases dealing with ballot access restrictions); L. Tribe, *American Constitutional Law*, § 13-20 (2d ed. 1988) (same); J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 781-85 (2d ed. 1983) (same). The traditional definition of strict scrutiny incorporates two elements: the state must demonstrate a compelling interest, and the statute in question must be the least restrictive means of furthering that interest. The Supreme Court applied this traditional form of strict scrutiny in two ballot access restriction cases. *See Williams*, 393 U.S. at 30-33; *Illinois State Board*, 440 U.S. at 185-86. In other cases applying strict scrutiny, the Court required that the state interest involved must be compelling, but did not inquire whether a less restrictive alternative would adequately protect the state's interest. *See Storer*, 415 U.S. at 729; *American Party*, 415 U.S. at 780-81. In one early case, the Court did not explicitly indicate which standard of review it used, but appeared to use only minimal scrutiny. *See Jenness*, 403 U.S. 431 (1971). The Court's most recent cases considering equal protection challenges to ballot access requirements seem to broaden traditional strict scrutiny to incorporate a balancing approach. *See Anderson*, 460 U.S. at 789; *Munro*, 479 U.S. at 200-01 (Marshall, J., dissenting). The Court set forth this balancing approach in *Anderson:*

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The application of strict scrutiny for purposes of equal protection challenges to ballot access restrictions involves a two – part analysis: the restriction must be necessary to serve a compelling state interest and may not go beyond what the state's interest actually requires.[10] *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977); *McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980). This court clarified its view of "strict scrutiny" as applied

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> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789 (citations omitted).

While we recognize the apparent inconsistency in the standard of review applied by the Supreme Court, we note that the ballot access requirement at issue here passes constitutional muster under any standard used by the Court – traditional strict scrutiny, the lessened scrutiny of *Storer*, the minimal scrutiny of *Jenness*, or the balancing test of *Anderson*. We leave closer examination of the relationship between the traditional strict scrutiny of *Williams* and the balancing test of *Anderson* for another day.

[10] This second requirement has also been articulated in terms of a "least restrictive means" test. *See Libertarian Party*, 764 F.2d at 540.

to ballot access challenges in *Libertarian Party v. Bond*,[11] stating:

> [A] court must determine whether the challenged laws "freeze" the status quo by effectively barring all candidates other than those of the major parties, *Jenness v. Fortson*, 403 U.S. at 439, 91 S. Ct. at 1974, and provide a realistic means of ballot access. *American Party of Texas v. White*, 415 U.S. at 783, 94 S. Ct. at 1307. The focal point of this inquiry is whether a "reasonably diligent [] ~~candidate~~ [can] be expected to satisfy the signature requirements." *Storer v. Brown*, 415 U.S. at 742, 94 S. Ct. at 1285. Thus, the test is whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, *i.e.*, whether the statute unreasonably encroaches on ballot access. *See Anderson v. Celebrezze*, 460 U.S. at 788 & n.9, 103 S. Ct. at 1570 & n.9 (1983) * * *.

764 F.2d at 541 (quoting *Libertarian Party v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983), *cert. denied*, 469 U.S. 831 (1984)).

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[11] While the discussion in *Libertarian Party* addressed "strict scruntiny" in relation to "perentage or numerical requirements fixed by the states," 764 F.2d at 541 n.3, similar reasoning applies to the presidential elector timing requirement at issue here. Like a percentage or numerical requirement, the date established by the Missouri statute is, in a sense, necessarily arbitrary. Once a particular date is established, it is difficult to defend that date as the least restrictive. In this case, for example, any date within a few days of August 1 would serve the state's interests as well as August 1. As pointed out in *Libertarian Party*, however, the thrust of the Supreme Court's teachings focus on whether the ballot access restrictions taken as a whole provide a reasonable means of furthering the compelling state interest while still providing reasonable ballot access for a new party. *Id.*

2. Analysis

a. State Interest

Clearly, the state's interests which are furthered by its election laws are compelling. It is a fundamental obligation of the states, imposed by Article II, Section 1, Clause 2 of the Constitution of the United States, to provide presidential electors:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Although Presidential electors do not appear on Missouri ballots, the significance of their role is unquestionable. Missouri law provides: "The names of candidates for presidential electors shall not be printed on the ballot but shall be filed with the Secretary of State in the manner provided in § 115.399." Mo. Rev. Stat. § 115.243.1. Any vote cast for candidates for President and Vice-President "shall be a vote for their electors." Mo. Rev. Stat. § 115.243.2. Further, when presidential and vice-presidential candidates are to be elected, the official ballot for the general election must include instructions stating "a vote for candidates for President and Vice-President is a vote for their electors." Mo. Rev. Stat. § 115.243.3.

The integrity of Missouri's general election ballot is protected by the requirement that Presidential electors file with the Secretary of State a declaration of candidacy.

Without such a declaration, there is no assurance that there are capable persons willing to serve as electors and carry out the wishes of Missouri voters in the national electoral college. Thus, because of Missouri's requirements that presidential electors file declarations of candidacy, when the Secretary of State certifies a candidate's name to appear on the Presidential ballot, he is assuring the voters that the candidate is qualified to serve and that their vote for that candidate is meaningful.

The state's interest in requiring new parties to file candidacy statements for their presidential electors *when they file their recognition petition* is similar. With an established party, the Secretary of State has assurance that there will be Presidential electors for their candidate, and there is no risk in printing the names on the ballot. For new political parties, however, declarations of candidacy for their presidential electors insure a vote cast for the new party will be a meaningful vote.

b. Burden

In examining the validity of the filing requirement, the district court looked at whether the date established by the legislature was reasonable. We agree with the district court that the time frame of the Missouri statutes is reasonable. The filing requirements are not burdensome or even impractical; they certainly are not an "insurmountable obstacle" for a party seeking a spot on the ballot. *See American Party*, 415 U.S. at 783-84 (ability of other minority parties to meet ballot access requirements demonstrate lack of burdensomeness). In fact, a "new

party" – the New Alliance Party – met the filing requirements for the November election.

The overwhelming conclusion in this case is that the Libertarian Party's failure to file its declarations of candidacy is not sufficient to support a claim that the requirement unconstitutionally burdens new parties, nor to suggest that the requirement does not fulfill a compelling state interest. The present case can be equated to the situation presented in *Unity Party v. Wallace*, 707 F.2d 59 (2d Cir. 1983).

In *Unity Party*, the state refused to put a senatorial candidate's name on the ballot because his acceptance, which was *mailed* on time, was *received* after the deadline. The court, while acknowledging the apparent severity of the sanction, focused on the simplicity of compliance. "Nothing before us indicates that compliance with the acknowledged acceptance requirement is difficult. There is no evidence in the record that compliance is time-consuming, complex or imposes any financial hardship." *Unity Party*, 707 F.2d at 62. Only the "careless or inadvertent failure to follow the mandate of the statute" gives rise to the complaint. *Id.* Here, as in *Unity Party*, compliance would have been easy.

The *Unity Party* court recognized that while nominees from established parties ordinarily were designated and held out to the public at the party's state conventions, the same could not be said for new party and independent candidates. *Id.*, 707 F.2d at 63-64. "Absent an acknowledged acceptance requirement, the States' ballots would be unnecessarily crowded and confused * * * ." *Id.* The court recognized New York's interest in preventing

fraudulent candidacies. Similarly, Missouri's ballot access statutes operate to preserve the integrity of the election process.

IV. CONCLUSION

Missouri's ballot access statute prevents the unnecessary crowding and confusion of its general election ballot. The statute does not impose any unreasonable burdens on new parties. The Libertarians have failed to get their Presidential candidate on the Missouri ballot. App. Br. at 7. Such failure, however, does not render Missouri's election statutes constitutionally invalid.

Accordingly, the Libertarians' motion is denied.

APPENDIX

States requiring new parties/independent candidates to submit petitions including presidential elector information before established parties have to submit presidential elector information:

	New Parties	Established Parties
Colorado[a]	August 2	September 23
Massachusetts[b]	August 30	September 13
New Hampshire[c]	August 10	October 25

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[a]Colo. Rev. Stat. §§ 1-4-801, 302-304, 701.

[b]Mass. Gen. L. § 8-53-8; *see Serrette v. Connolly*, No. 68172 (Suffolk County Superior Court, June 19, 1985) (declaring old petition date unconstitutional and requiring new parties to file petitions by last Tuesday in August).

[c]N.H. Rev. Stat. Ann. §§ 4-653:8, 655:40-45, 667:21.

	New Parties	Established Parties
New Jersey[d]	August 1	August 25
Pennsylvania[e]	August 1	September 16
Rhode Island[f]	August 31	October 14
West Virginia[g]	August 1	September 15

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. The majority rightfully holds that the appropriate standard of review is one of strict scrutiny. In *Anderson v. Celebrezze,* 460 U.S. 780, 793-94 (1983), the Supreme Court Stated:

> *[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.* * * *

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[d]N.J. Rev. Stat. § 19:13-15 (established parties must nominate electors at convention and file certificates of nomination with the Secretary of State within one week of nomination); *LaRouche v. Burgio,* 594 F. Supp. 614 (D.N.J. 1984); April 18, 1988 Secretary of State ruling (deadline for new parties should be August 1).

[e]Pa. Stat. Ann. § 25-2878 (established parties must file presidential elector information within thirty days of national convention); *Libertarian Party of Pennsylvania v. Davis,* No. 84-0262 (M.D. Pa. 1984) (new parties must file nomination papers on or before August 1).

[f]R.I. Gen. Laws § 17-12-13; *McCarthy v. Noel,* 420 F. Supp. 799 (D.R.I. 1976) (mid-July deadline for new parties unconstitutional); July 1988 Secretary of State ruling (petitions for third party and independent candidates accepted until August 31).

[g]W.Va. Code § 3-5-21, 21-24.

> *A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.* It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outisde the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment – "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," are served when election campaigns are not monopolized by existing political parties.

Id., 460 U.S. at 793-94 (footnotes and citations omitted, emphasis added).

Thus, the state comes to us with the very heavy burden of justifying the early filing requirement for presidential electors of "new" political parties. It has not met this burden.

The rationale advanced by the state for having an earlier filing date for "new" parties is that it is necessary to assure that there are capable and qualified persons to serve as electors for the "new" political party before the party's presidential candidate is placed on the ballot. The state also argues that its interest in efficiency is better served by requiring a "new" party to file its list of presidential electors before the state undertakes the task of

verifying petition signatures. Neither rational meets the strict scrutiny requirements of *Anderson v. Celebrezze*.

On August 1, 1988, the Libertarian Party filed 41,499 petition signatures, more than two times the showing of support required by statute. In view of the substantial showing of support required by the state and the actual support demonstrated by appellants, it is difficult to credit the concern that a "new" political party will not be able to find a sufficient number of qualified presidential electors.

In addition, even if one were to credit the state's concerns, it has not shown that those concerns cannot be met by a deadline later than August 1. The state represents that it need not begin distribution of absentee ballots until September 27, 1988. Even allowing the state a reasonable time to verify the qualifications of proposed electors for new parties prior to distribution of absentee ballots, it would appear that the September 7, 1988 filing of the appellant afforded the state sufficient time to protect its interest.

It is undeniable that the earlier filing deadline places obstacles in the path of the Libertarian Party which do not exist for either the Republican or Democratic Party. In light of the minimal interests served by the obstacle, they must fall.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2394

Jay Manifold, Judy Roberts, Tom Hanna, Michael D. Lewis, Roy G. Liberman, Marshall E. Cobb, James Carter, John Gieringer, Theresa Worley, Greta S. Buzzard, Peter M. Kerr, Carol Jean Tucker, Thomas Martin Edelman, Franklin M. Nugent, Mike Hurley, Gerald Geier, Michael J. D'Hooge, Mike Roberts a/k/a Warren A. Roberts, III, and The Libertarian Party of Missouri,	*	Order Denying Petition for Rehearing En Banc.
Appellants,	*	
v.	*	
Roy D. Blunt, Secretary of State for the State of Missouri,	*	
Appellees.	*	

Filed: March 13, 1989

Before LAY, Chief Judge, HEANEY,* Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

The petition for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Judge Fagg voted to grant the petition for rehearing en banc.

The petition for rehearing is also denied by the court.

HEANEY, Senior Judge, with whom LAY, Chief Judge, McMILLIAN and ARNOLD, Circuit Judges, join, dissenting from the Court's decision not to grant appellant's motion to rehear this appeal en banc.

Because the State of Missouri failed to meet its burden of justifying the earlier filing requirement for presidential electors of "new" political parties, I believe this statutory provision violates the Equal Protection Clause of the United States Constitution. I would grant the petition for en banc review for the reasons outlined below.

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*The HONORABLE GERALD W. HEANEY assumed senior status on January 1, 1989.

BACKGROUND

On August 11, 1988, the Libertarian Party of Missouri presented to the Secretary of State a recognition petition containing sufficient signatures to qualify as a "new" political party under Mo. Rev. Stat. §§ 115.315 and 115.317. The Libertarians presented a final list of presidential electors or declarations of their candidacy on September 7, 1988. The following day, the Secretary of State informed the party that its candidates for president and vice president would not appear on the Missouri ballot because it had failed to file its final list of electors by August 1, 1988. Mo. Rev. Stat. § 115.329 provides that the Secretary of State will not accept any petition for the formation of a "new" party or for the nomination of an independent candidate submitted after the first Monday in August immediately preceding the general election. A list of the "new" party's presidential electors must be filed the same day. Mo. Rev. Stat. § 115.399(2) provides, however, that "established" parties need not submit such a list until the third Tuesday before the general election; in this case, the deadline would have been October 18, 1988.

The appropriate standard of review for challenges to ballot access restrictions is one of strict scrutiny. In *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983), the Supreme Court stated:

> *[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.* * * * ——

> *A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.* It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment – "a profound national commitment to the principle that debate on public issues should be uninhabited, robust, and wide-open," are served when election campaigns are not monopolized by existing political parties.

Id., 460 U.S. at 793-94 (footnotes and citations omitted, emphasis added).

Thus, the state came to a panel of this Court with the very heavy burden of justifying the early filing requirement for presidential electors of "new" political parties. It did not meet this burden.

The rationale advanced by the state for having an earlier filing date for "new" parties was that it is necessary to assure that there are capable and qualified persons to serve as electors for the "new" political party before the party's presidential candidate is placed on the ballot. The state also argues that its interest in efficiency

is better served by requiring a "new" party to file its list of presidential electors before the state undertakes the task of verifying petition signatures. I believe that neither rational meets the strict scrutiny requirements of *Anderson v. Celebrezze.*

On August 1, 1988, the Libertarian Party filed 41,499 petition signatures, more than two times the showing of support required by statute. In view of the substantial showing of support required by the state and the actual support demonstrated by appellants, it is difficult to credit the concern that this "new" political party would not have been able to find a sufficient number of qualified presidential electors.

In addition, even if one were to credit the state's concerns, it did not show that those concerns could have been met by a deadline later than August 1. The state represented that it did not need to begin distribution of absentee ballots until September 27, 1988. Even allowing the state a reasonable time to verify the qualifications of proposed electors for new parties prior to distribution of absentee ballots, it appears that the September 7, 1988, filing of the appellant would have afforded the state sufficient time to protect its interest.

It is undeniable that the earlier filing deadline placed an obstacle in the path of the Libertarian Party which did not exist for either the Republican or Democratic Party. In light of the minimal interests served by this obstacle, the provision should have been found unconstitutional.

Accordingly, I dissent from the Court's decision not to review this case en banc.

A true copy.

Attest:___

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.